REME COURT, U. S.

75-585

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-

WILLIAM REILLY,

Petitioner,

v.

UNITED STATES OF AMERICA

and

MATHIASEN'S TANKER INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, William Reilly, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered in the above case on June 25, 1975, reversing the Findings of Fact, Conclusions of Law, Verdict and Judgment of the United States District Court for the Eastern District of Pennsylvania in favor of Petitioner and against Respondent, United States of America.

OPINIONS OF THE COURTS BELOW.

The United States Court of Appeals for the Third Circuit filed an unreported Opinion [captioned *"Not For Publication"*, *infra* (Appendix B, p. 3a)] on June 25, 1975, from which Circuit Judge Weis dissented and filed a dissenting Opinion, reversing the Findings of Fact, Conclusions of Law, Verdict and Judgment in favor of Petitioner and against Respondent, United States of America. Said Opinion is printed, *infra* (Appendix B, pp. 3a-14a). On the same date a Judgment Order was entered reversing the judgment of the United States District Court for the Eastern District of Pennsylvania in favor of Petitioner and against Respondent, United States of America. Said Judgment Order is printed, *infra* (Appendix C, p. 15a).

The United States Court of Appeals for the Third Circuit thereafter entered an Order denying Petition for Rehearing on July 28, 1975; no hearing was granted and no specific reason was given for the denial. Said Order is printed, *infra* (Appendix D, pp. 16a-17a).

The Findings of Fact, Conclusions of Law, Verdict and Judgment of the United States District Court for the Eastern District of Pennsylvania in favor of Petitioner in the amount of $79,425.07 and against Respondent, United States of America, was entered on June 4, 1974 and is unreported. Said Findings of Fact, Conclusions of Law and Judgment is printed, *infra* (Appendix E, pp. 18a-40a).

JURISDICTION.

The Judgment Order of the United States Court of Appeals for the Third Circuit reversing the Judgment of the United States District Court for the Eastern District of Pennsylvania was entered on June 25, 1975 and is printed, *infra* (Appendix C, p. 15a). The Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing was entered on July 28, 1975 and is printed, *infra* (Appendix D, pp. 16a-17a). The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1) and the All Writs Statute, 28 U. S. C. A. § 1651.

QUESTION PRESENTED.

May the Court of Appeals substitute its findings and judgment for the Findings of Fact, Conclusions of Law, Verdict and Judgment of a District Court Judge sitting in a nonjury case and reverse said findings and judgment of the Trial Judge, where conflicting testimony and serious issues of credibility of witnesses are presented with respect to the facts relating to liability, when there is substantial evidence in the trial record to support the Findings of Fact, Conclusions of Law, Verdict and Judgment of the District Court Judge.

STATUTES INVOLVED.

The Statutory provisions involved are 46 U. S. C. § 741-752 and 46 U. S. C. § 781-790. The specific statutory provisions applicable in this matter, 46 U. S. C. § 742, § 743 and § 781 are printed, *infra* (Appendix A, pp. 1a-2a).

STATEMENT OF THE CASE.

On July 24, 1970, Petitioner, a merchant seaman, while employed by Mathiasen's Tanker Industries, Inc., as a member of the crew of the U. S. N. S. Suamico, a public vessel owned by Respondent, United States of America, was caused to sustain a serious and permanently disabling intertrochanteric fracture of the right femur while reboarding the vessel, which was berthed in open waters, from a launch at approximately 1:00 o'clock A. M. Petitioner instituted suit under the admiralty law as modified by the Suits in Admiralty Act, 46 U. S. C. §§ 741-752, and the Public Vessels Act, 46 U. S. C. §§ 781-790.

A nonjury trial was held before the United States District Court for the Eastern District of Pennsylvania, in which conflicting testimony was presented as to the manner in which Petitioner's injuries were sustained. The United States District Court for the Eastern District of Pennsylvania resolved the factual conflicts on the issue of liability in favor of Petitioner, found that the vessel was unseaworthy and the owner and operator thereof negligent and rendered a verdict and judgment in favor of Petitioner in the amount of $79,425.07. (Said judgment was rendered against Respondent, United States of America, alone, in light of *Petition of United States*, 367 F. 2d 505 (3d Cir. 1966), *cert. den.* 386 U. S. 392, *reh. den.* 386 U. S. 1000 (1967)).

Respondent, United States of America, appealed. The Court of Appeals for the Third Circuit, in a two-to-one decision with Circuit Judge Weis writing a dissenting opinion (Appendix B, pp. 11a-14a), reversed the findings, verdict and judgment of the District Court on the ground that the "undisputed physical facts" made the District Court's factual findings clearly erroneous. A Petition for Rehearing by the Court of Appeals in Banc was denied on July 28, 1975.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Reversal of the District Court's Findings of Fact, Conclusions of Law, Verdict and Judgment in Favor of Petitioner by the United States Court of Appeals for the Third Circuit Undermines the Heretofore Inviolate Province of a Trial Judge Sitting as a Fact Finder and Rendering a Nonjury Verdict, Where Serious Issues of Credibility and Conflicting Testimony Are Involved, and Violates the Law of the United States Under this Court's Decisions in *Basham v. Pennsylvania Railroad Co.*, 372 U. S. 699, and *Lavender v. Kurn*, 327 U. S. 645.

Certiorari is essential to prevent grave injustice to Petitioner, a merchant seaman and a ward of this admiralty court, and to preserve the law of the United States in consonance with heretofore recognized principles concerning the scope of appellate review, as enunciated by this Court in *Basham v. Pennsylvania Railroad Co.*, 372 U. S. 699 (1963) and *Lavender v. Kurn*, 327 U. S. 645 (1946).

In *Basham v. Pennsylvania Railroad Co., supra*, this Court reversed the judgment of the New York Court of Appeals, which had affirmed the trial judge in setting aside a jury verdict in favor of petitioner. In that FELA action a jury verdict had been returned in favor of petitioner, a repairman employed by Pennsylvania Railroad, on the ground that the railroad was negligent. The railroad had introduced evidence demonstrating that it was physically impossible for the accident to have happened in the manner alleged. It was on this basis that the trial judge set aside the jury's verdict. In reversing, this Court concluded that "it was error for the New York trial and appellate courts to reevaluate the conflicting evidence and mandate a result

opposite from that reached by the jury . . . [s]ince there was an evidentiary basis for [the jury's] verdict." (372 U. S. 700). This Court concluded, therefore, that "the state courts improperly invaded the function and province of the jury in setting the verdict aside." (372 U. S. 701).

Similarly, in *Lavender v. Kurn*, *supra*, another FELA action, this Court reversed the judgment of the Supreme Court of Missouri, which had reversed a jury's verdict and judgment entered thereon in favor of petitioner, whose decedent was a switch-tender who was killed in the switch-yard at Grand Central Station in Memphis, Tennessee. There, petitioner's case was presented to the jury based wholly upon circumstantial evidence, there being no eye-witnesses to the accident. Respondents produced evidence tending to show that it was physically and mathematically impossible for the accident to have occurred in the manner alleged by petitioner. Nonetheless, a jury verdict in favor of petitioner was returned.

This Court reversed the Supreme Court of Missouri, in setting aside such jury verdict, on the ground that there was a reasonable basis in the trial record to support the jury's verdict, even though such verdict was based upon an inference. In support of such conclusion, this Court stated:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." (327 U. S. 652, 653).

In explaining the legal rationale for its decision, this Court stated:

"Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." (327 U. S. 653).

In a nonjury case, the trial judge's findings of fact and inferences drawn therefrom are entitled to the same weight as the verdict of a jury. "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous." *McAllister v. United States*, 348 U. S. 19, 20 (1954);[1] see also *Krusen v. Dinan*, 465 F. 2d 1298 (3 Cir. 1972) and dissenting opinion of Judge Weis in the Court below, *infra* (Appendix B, p. 12a).

As was observed by Judge Weis in his dissenting opinion in the Court below:

"The district court's conclusions that the defendant was negligent and that an unseaworthy condition

1. In the *McAllister* case, *supra*, the District Court, sitting without a jury, entered judgment in favor of petitioner, a merchant seaman, and against the United States under the Suits in Admiralty Act, 46 U. S. C. § 741 *et seq.* As in the instant appeal, the Court of Appeals reversed the findings and judgment of the District Court, on the ground that no proximate cause was shown between the negligence of the United States and petitioner's injuries. This Court reversed the judgment of the Court of Appeals and reinstated the Findings of Fact and Judgment of the District Court on the ground that the District Court's Findings were based upon reasonable inferences from the facts proved and, accordingly, were not clearly erroneous.

> existed were supported by reasonable inferences drawn from the testimony. The findings of fact were not 'clearly erroneous,' and therefore I would affirm the district court's findings on liability." *Infra* (Appendix B, p. 14a).

In light of that observation, the function of the appellate Court below was exhausted, it being immaterial that that Court might draw a contrary inference or feel that another conclusion was more reasonable. *Commercial Union Assurance Company, Ltd. v. Berry*, 359 F. 2d 510, 516 (8 Cir. 1966). As was stated in *Brennan v. Midwestern United Life Insurance Company*, 417 F. 2d 147, 149 (7 Cir. 1969), *cert. den.* 397 U. S. 989 (1970).

> ". . . an appellate tribunal may not retry the case or substitute [its] judgment for that of the trial judge. It is he, who after judging the credibility of the witnesses, weighing the evidence, and drawing inferences, makes factual determinations. Our function is to ascertain, after considering the record in its entirety, whether the inferences drawn by the trial judge have a sufficient evidentiary basis so that it can be said they are reasonable, that is, could have been arrived at by logical deduction. In performing that function, *we may not resolve testimonial conflicts or attempt to judge the credibility of witnesses*". (417 F. 2d 149—Emphasis Added).

See also *Grove v. First National Bank of Herminie*, 489 F. 2d 512 (3 Cir. 1973).

The majority of the Panel of the Court below [2] failed to observe the tenets as enunciated by this Court and to

2. The decision of the Panel of the Court below reversing the Findings of Fact and Judgment of the District Court was a two-to-one decision, with Circuit Judge Weis dissenting.

follow its own pronouncements in the *Grove* case, *supra,* defining the scope of appellate review of findings of fact of a district court judge sitting in a nonjury case. In so doing the Court below has undermined the historic fact-finding function of a district court judge sitting in a nonjury case and has violated Petitioner's basic right to "an appropriate nonjury proceeding in personam . . . against the United States" which "shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties", as is guaranteed to him under the Suits in Admiralty Act, 46 U. S. C. § 742 and § 743.

In attempting to justify its reversal of the district court's findings and the substitution of its findings and conclusions for those of the trial judge, the Court below seizes upon an "undisputed physical facts" or "undisputed physical evidence" concept, which, as Circuit Judge Weis points out in his dissenting opinion, has no application in this case.[3] Moreover, the very facts and inferences which were found by the Court below to be "undisputed physical facts" were not undisputed physical facts at all, but challenged testimony that was susceptible of varying interpretations, the credibility of which was solely for the determination of the trial judge sitting without a jury, as were any inferences to be drawn therefrom.[4] See *McAllister v. United States, supra.*

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3. In his dissenting opinion in the Court below, Circuit Judge Weis states:

> "This is not a case for the application of the undisputed physical evidence rule because so many of the critical facts depended upon estimates and were not susceptible to precise measurements." *Infra* (Appendix B, p. 13a)

4. Circuit Judge Weis, in his dissenting opinion, demonstrates wherein the district court judge properly exercised his historic fact-finding function in stating:

> "The trial judge's findings here indicate an awareness that he was dealing with the testimony of witnesses whose estimates were nothing more than that and far from being exact engi-

CONCLUSION.

The decision below undermines the heretofore inviolate province and exclusive function of a Trial Judge sitting as a fact finder and rendering a verdict in a nonjury case, where serious issues of credibility and conflicting testimony are involved. It is directly contrary to prior decisions of this Court. For that reason alone, certiorari is absolutely essential to review this decision in order that justice be done. Moreover, to allow the decision below to stand will open a pandora's box to appeals to the Courts of Appeals of the United States for *de novo* review, in cases where the sole issue on appeal relates to the credibility of testimony of witnesses at the trial and the evidentiary sufficiency of the trial court record to support the findings and verdict of the Trial Judge. Such is contrary to the present policy and needs of the courts of the United States in their attempt to limit the number of appeals to and workload of the Court of Appeals. Accordingly, certiorari should be granted, and the decision below reversed.

Respectfully submitted,

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FREEDMAN, BOROWSKY AND LORRY,
Counsel for Petitioner.

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4. (Cont'd.)
neering measurements. The fact that this accident occurred under poor lighting conditions at night cannot be ignored. The district court's findings do not accept, *ipsissimis verbis*, the testimony that the LCM 'smashed' into plaintiff Reilly or that the boat rose 3 to 4 feet on a wave or swell. Taking a more dispassionate view, the trial judge simply determined that there was an 'impact' between the plaintiff and the LCM, causing him to be thrown against either the ship's hull or the gangway. The cause of the injury was found to have been either the impact or the twisting which accompanied it." *Infra* (Appendix B, pp. 12a-13a, footnotes omitted).

APPENDIX A.

46 U. S. C. 742.

§ 742. Libel in personam.

In cases where if such vessel were privately owned or operated, or if such cargo were private owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Mar. 9, 1920, c. 95, § 2, 41 Stat. 525; Sept. 13, 1960, Pub. L. 86-770, § 3, 74 Stat. 912.

46 U. S. C. 743.

§ 743. Procedure in cases of libel in personam.

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules

of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

Mar. 9, 1920, c. 95, § 3, 41 Stat. 526.

46 U. S. C. 781.

§ 781. Libel in admiralty against or impleader of United States.

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920.

Mar. 3, 1925, c. 428, § 1, 43 Stat. 1112.

APPENDIX B.

NOT FOR PUBLICATION.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

—

No. 74-1896.

—

WILLIAM REILLY

v.

UNITED STATES OF AMERICA AND MATHIASEN'S TANKER INDUSTRIES, INC.,
United States of America, Appellant.

—

D. C. Civil Action No. 70-3450.

—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

—

Argued March 4, 1975.

Before ADAMS, ROSENN and WEIS, *Circuit Judges.*

WILLIAM G. DOWNEY, ESQUIRE,
NICHOLAS A. LEONARD, ESQUIRE,
Clark, Ladner, Fortenbaugh & Young,
Attorneys for Appellant,

ROBERT C. DANIELS, ESQUIRE,
Freedman, Borowsky and Lorry,
Attorney for Appellee.

OPINION OF THE COURT.

(Filed June 25, 1975.)

ROSENN, *Circuit Judge:*

The United States appeals from a judgment entered in the United States District Court for the Eastern District of Pennsylvania on a non-jury verdict in favor of the plaintiff, William Reilly, a merchant seaman, for injuries sustained while boarding ship. Reilly was employed as a saloon messman aboard the U. S. N. S. SUAMICO, an oil tanker owned by the United States and operated by Mathiasen's Tanker Industries, Inc.

On July 23, 1970, the SUAMICO was anchored at Terrington Basin, Goose Bay, Labrador, waiting to unload its cargo of aviation gas for the United States Air Force base. At about 7:00 P. M., Reilly and a number of his fellow crewmen went ashore aboard an LCM (landing craft mechanized). While on shore, Reilly and his friends visited a U. S. O. Club. It is unclear whether they drank only beer or also more potent liquor.

The LCM was operated by the Canadian Department of Transport under contract with the United States to provide crewmen with ship-to-shore transportation. Originally designed to transport troops and equipment to beachheads during times of war, the LCM had a flat-bottomed hull and a high squared-off bow. It was approximately 56 feet long, 14 feet in beam, and weighed about 28 tons.

The events occurring upon Reilly's return to the SUAMICO at about 1:00 A. M. the next day are the subject of the instant controversy. Reilly's version of the events, confirmed by depositions of two fellow crewmen, was that when the LCM came abreast of the SUAMICO gangway, an available boat line was not used to secure the LCM. Rather, the LCM captain tried to maintain his position by

using his controls and engines which resulted in the LCM's bobbing to and fro in the water. Also, the bottom of the gangway, which had been even with the gunwale of the LCM during disembarkation earlier that evening, was now four feet above the gunwale.[1] No gangway watchman or deck officer was present to lower the gangway.

Reilly testified that in attempting to board the SUAMICO, he was forced to grab hold of the gangway's chain bridle with his right hand, step up with his left leg onto the bottom of the gangway,[2] and then pull his right leg even with his left. Before Reilly could pull his right leg onto the gangway, the bow of the LCM either rose up and threw him against the SUAMICO's side or gangway, or dropped away, leaving him suspended, and then returned to throw him against the ship or gangway. After striking Reilly, the LCM immediately pulled back, at which time one of his fellow crewmen reached out and prevented him from falling into the water. As a result of the blow, Reilly suffered an intertrochanteric fracture of his right hip and a compression fracture of his first lumbar vertebra. At the time of the accident, Reilly was 64 years of age, six feet one inch tall, and weighed about 130 pounds.

The United States' version of the fall, as recounted by the engineer of the LCM, was that a man fitting Reilly's description fell three or four steps up the gangway. The engineer described the fall as "queer" because the upper body of the man twisted so that his face could be seen by those in the LCM. The engineer did not believe that the man had hit anything hard enough to hurt himself.

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1. Plaintiff, at deposition, testified that the distance between the gunwale and the platform of the gangway "could be five to six feet."

2. There is a dispute as to whether the gangway had a platform. Reilly testified at trial to the absence of one. He also testified, however, that he had no recollection of his deposition testimony concerning the presence of the gangway platform.

The district court accepted Reilly's version of the fall and found the SUAMICO to have been unseaworthy at the time plaintiff attempted to board because the LCM was not secured by the available boatline and because no member of its crew was present to see that the bottom of the ship's gangway was evenly positioned with the gunwale of the LCM. The court found the United States to have been negligent for the same reasons and also for the failure of the crew of the LCM to have aided or assisted Reilly in his disembarkation. Damages of $79,425.07 were awarded against the United States,[3] which appeals, asserting that the district court erred in its findings of fact and computation of damages. We are convinced that the findings of fact are clearly erroneous and reverse the judgment of the district court.

The role of an appellate court in reviewing the factual findings of a district court is limited of course to determining whether the findings are clearly erroneous. Fed. R. Civ. P. 52(a). *Krasnov v. Dinan*, 465 F. 2d 1298, 1302 (3d Cir. 1972). Our role is subject to the same limitation in reviewing the judgment of the district court, sitting without a jury, in admiralty. We realize that the trier of fact has the primary responsibility of weighing the evidence, selecting from the conflicting inferences those he considers most reasonable, and determining the credibility of the parties. Nonetheless, the "clearly erroneous" standard of review requires that a finding of fact must be based on proof, not intuition or speculation; the probative facts must be capable of supporting with reason the conclusions expressed in the verdict. *In re Leichter*, 197 F. 2d 955, 957

3. The parties agreed at the beginning of the trial to the dismissal of Mathiasen Tanker Industries, Inc., as a main defendant in light of this court's decision in Petition of the United States, 367 F. 2d 505 (3d Cir. 1966), *cert. denied*, 386 U. S. 932 (1967).

(3d Cir., *cert. denied,* 344 U. S. 914 (1952). Moreover, when the undisputed physical facts make the credibility of the oral testimony very doubtful, the findings of the trial court, although based on the credibility of the witnesses, may be held to be erroneous. *Oliver J. Olsen & Co. v. Luckenbach S. S. Co.,* 279 F. 2d 662, 668 (9th Cir.), *cert. denied,* 364 U. S. 881 (1960). Thus, a finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Oregon Medical Society,* 343 U. S. 326, 339 (1952); *McAllister v. United States,* 348 U. S. 19, 20 (1954); *O'Neill v. United States,* 450 F. 2d 1012 (3d Cir. 1971). After a careful review of the record, we are convinced that the undisputed physical evidence conflicts with Reilly's version of the accident and supports the version of the United States.

The district court found that the LCM threw Reilly against the SUAMICO's side or gangway as he attempted to mount the gangway from the LCM. Reilly and one crewman testified that the LCM "smashed" into Reilly as he had the left foot on board the gangway and his right leg suspended in the air. Reilly testified that the LCM struck him in the right hip or upper right leg area; the crewman could not see what part of the body was hit. The other crewman testified that the side of the LCM hit Reilly in the right hip and upper leg area. An examination, however, of the right hip and upper right leg by Air Force doctors the next morning revealed no echymosis or bruising. Moreover, Reilly's medical expert testified that the type of fracture incurred "is not from a direct blow, it is from a twisting of the hip." Reilly offers no explanation of how a 28-ton boat could smash him into the SUAMICO, not leave a bruise, not cause a

fracture, and still be the instrumentality responsible for his condition.[4]

The district court found that Reilly was struck by the bow of the LCM. Although the two crewmen testified that they disembarked from the bow, the description of the LCM in evidence reveals that it would have been hardly possible to leave the LCM from the closed bow in view of its height and the grating above. Disembarkation would have been extremely difficult from anywhere forward of an opening located near the cabin, about 50 feet aft of the bow, because of a deep well running from the bow to the cabin. Reilly testified that, to the best of his recollection, he disembarked at a point near the pilot's cabin which he placed about midship. The engineer confirmed Reilly's account. We find it inconceivable that the LCM could have jumped back some forty to fifty feet and stricken Reilly with its bow in the time it would have taken him to board the gangway.

Had Reilly been struck by that part of the LCM from which he disembarked, it is still highly unlikely for the accident to have occurred as he described. Reilly testified that the bottom of the SUAMICO gangway was four feet above the gunwale of the LCM. One crewman placed the gangway bottom three to four feet above the gunwale; the other stated that the distance was great enough so that one could not step up easily. Reilly, with his left foot on the ship's gangway and right hand on the chain bridle, claimed he was in the process of swinging his right leg over the gangway when struck by the LCM in the right hip or upper right leg area. Reilly's right hip must have been at least level with the bottom of the

4. The medical evidence could be consistent with a fall occasioned by Reilly's losing his balance due to the bobbing of, or being grazed by, the LCM. The testimony of the witnesses, however, does not support these versions of the accident.

gangway because he testified that he was struck while bringing his "right leg over to put it beside [his] left on the gangway." One crewman confirmed that the right leg was in the air; the other testified that the LCM pulled back leaving Reilly's right leg in the air before smashing him into the SUAMICO. The LCM, then, must have risen at least three to four feet [5] in the water in the short time necessary for Reilly to swing his right leg onto the gangway.

One explanation offered by Reilly for this dramatic upheaval of the 28-ton LCM was that the sea was choppy and rough. The testimony of the eyewitnesses to the accident was contradictory, the crewmen testifying that there were two-to-three-foot waves, while the LCM engineer testified that he had never seen two-to-three-foot waves in Terrington Basin, absent a wind of 30 to 40 miles per hour. The chief meteorologist of the Philadelphia station of the United States Weather Service calculated, however, from the topography of Terrington Basin that the approximately ten-knot wind prevailing the night of the accident would have had no "significant effect on the water surface" other than to produce a "light chop."

The other explanation offered, credited by the district court, was that the running of the LCM's engines to keep it abreast of the gangway caused the craft to bob back and forth and up and down. This explanation was offered by an expert testifying on behalf of Reilly, but his testimony was unclear as to whether the wash generated by running the engines in a calm sea could have caused the greater than three-foot rise required to support Reilly's version of the accident. On the other

5. It is probable that the LCM would have had to rise more than three to four feet because to the extent that Reilly, six feet, one inch tall, had straightened his left leg, his right hip would have been elevated that much more above the bottom of the gangway.

hand, the engineer testified that an LCM traveling from ship to shore creates waves of only six inches, and very little turbulence would be created when the propellors were turning slowly. We believe it incredible that the use of the engines necessary to keep the LCM abreast of the ship's gangway would have caused a 28-ton vessel on a calm sea to rise and fall distances in excess of three feet.[6]

A final difficulty with Reilly's version of the accident is his explanation of why the ship's gangway was rigged so that the bottom end hung three to four feet above the gunwale of the LCM. Reilly and the two crewmen testified that the bottom of the gangway had been level with the gunwale when they had left the SUAMICO earlier in the evening. One crewman testified that the ensuing three-to-four-foot gap was caused by a rise in the tides. A more plausible explanation offered was that the discharge from the SUAMICO of the cargo aviation gas caused the rise. The United States showed, however, that a malfunction in hose coupling delayed the commencement of gas discharged until nearly 12:00 midnight. Assuming that the ship discharged the maximum amount possible per hour,[7] the ship could have risen no more than 13 inches by the time of Reilly's accident at about 1:30 A. M. Another possible explanation was that the gangway was raised by a member of the crew. No reason is given, however, why the gangway would have been raised. The LCM's apparently were the exclusive means by which crew mem-

6. It might be argued that the LCM was bobbing in the water as a result of swells caused by its approach to the SUAMICO. Reilly was preceded up the gangway, however, by at least two other crewmen. Any turbulence caused by the LCM's approach to the ship would have subsided by the time Reilly started up the gangway.

7. It is unlikely that discharge of the maximum amount was possible since testimony indicated that the ship did not pump anywhere near capacity at the commencement of discharge.

bers traveled ship to shore that night. Even if other launches were used, and no evidence indicates that they were, the launches were smaller vessels than the LCM's, and the gangway would have had to have been lowered, not raised, to reach the gunwales of the launches.

In sum, the absence of any signs of a bruise the next morning, evidence that the fracture was caused by a twisting rather than a direct blow, the implausibility of the wash from the LCM's propellers raising the 28-ton craft in excess of three feet in a calm sea, and the lack of any explanation why the bottom of the gangway, level with the gunwale at the time of departure, had risen at least three feet above the gunwale at the time of the alleged accident, convinces us that Reilly's injury was not attributable to a blow from the LCM. No other explanation for the injury was offered by Reilly. He had the burden of proving that unseaworthiness or negligence caused his injuries. *Ramos v. Matson Navigation Co.*, 316 F. 2d 128, 131 (9th Cir. 1963). We conclude, therefore, that the weight of the physical evidence supports the engineer's version of the accident and that the findings of fact of the district court were clearly erroneous. The evidence is insufficient from which to find that Reilly's injuries, either in whole or in part, were caused by any unseaworthiness of the SUAMICO or negligence of the United States. In the absence of such evidence, we may not impose liability on the United States.

In view of our disposition of the liability question, we do not consider the remaining issues raised by the United States.

The judgment of the district court will be reversed.

WEIS, *Circuit Judge*, dissenting:

Like most accidents which underlie negligence cases, this one happened very quickly and unexpectedly. The

impressions of witnesses to such occurrences understandably vary, and the ability to perceive what actually occurred depends upon such crucial factors as sensory concentration, the presence of warnings which alert persons to the impending mishap, and limitations on observation at critical times caused by physical obstructions or lighting conditions. In addition, a witness' memory, bias, or background may hamper an accurate articulation of possibly imperfect perceptions. For these reasons, courts extend great deference to the findings of juries in negligence cases. A jury is not bound to accept the version of either party to a dispute but is free to conclude that the truth falls somewhere between the extremes espoused by the adverse parties.

The findings of a judge have not been given as much weight as those of a jury,[1] but his factual determinations must be accepted by an appellate court unless they are clearly erroneous, *Krasnov v. Dinan*, 465 F. 2d 1298 (3d Cir. 1972). The trial judge, just like jurors, is expected to sift back from hyperbole and distinguish reality from revisionism in weighing the testimony.

The trial judge's findings here indicate an awareness that he was dealing with the testimony of witnesses whose

1. Judge Jerome Frank took note of this anomaly in Orvis v. Higgins, 180 F. 2d 537, 540 n. 7 (2d Cir.), *cert. denied*, 340 U. S. 810 (1950), as follows:

> "A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's finding has far less respect because he is blessed neither with jurors' inexperience nor administrative officers' expertness."

Interestingly enough, the biographical data of the trial judge reveal that he was an officer in the United States Navy during World War II, and he stated on the record of this proceeding that he was familiar with the LCM.

estimates were nothing more than that and far from being exact engineering measurements. The fact that this accident occurred under poor lighting conditions at night cannot be ignored. The district court's findings do not accept, *ipsissimis verbis,* the testimony that the LCM "smashed" into plaintiff Reilly or that the boat rose 3 to 4 feet on a wave or swell.[2] Taking a more dispassionate view, the trial judge simply determined that there was an "impact" between the plaintiff and the LCM, causing him to be thrown against either the ship's hull or the gangway. The cause of the injury was found to have been either the impact or the twisting which accompanied it. Mathematics may cast some doubt upon the accuracy of plaintiff's estimates of size, distance and time, but lack of precision does not prove that Reilly's general description of what occurred is incredible. Similarly, an absence of bruises on the plaintiff's hip—if that be accepted as fact—does not preclude a fracture caused by a twisting motion.

The plaintiff did not have the burden of explaining why the gangway was at a greater height above the water when he returned to the ship than it was at the time of his departure earlier in the day. It was enough to show that the condition existed and that the defendant had failed to correct it. It is, therefore, immaterial that the plaintiff's theories on why the condition existed may be somewhat weak.

This is not a case for the application of the undisputed physical evidence rule because so many of the critical facts depended upon estimates and were not susceptible to precise measurements.

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2. With a landlubber's background, I must confess that I am unable to conclude that it was "incredible" that the flat-bottom landing craft would bob up and down to some degree under the conditions existing at the time the accident took place. I also note that the district court, rather than locating the gangway at a specific height, found simply that it "was some distance above the gunwale of the L. C. M. . . ."

The district court's conclusions that the defendant was negligent and that an unseaworthy condition existed were supported by reasonable inferences drawn from the testimony. The findings of fact were not "clearly erroneous," and therefore I would affirm the district court's findings on liability. Since the majority's decision makes it unnecessary to discuss the question of damages, I likewise refrain from doing so, other than to indicate that my position on liability is not an approval of all of the trial court's rulings of law on damages.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1896.

WILLIAM REILLY

v.

UNITED STATES OF AMERICA AND
MATHIASEN'S TANKER INDUSTRIES, INC.,

UNITED STATES OF AMERICA,
Appellant.

(D. C. Civil Action No. 70-3450)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, ROSENN and WEIS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 6, 1974, be, and the same is hereby reversed. Costs taxed against appellee.

ATTEST:
THOMAS P. QUINN,
Clerk.

June 25, 1975.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1896.

WILLIAM REILLY

v.

UNITED STATES OF AMERICA,
Appellant,

AND

MATHIASEN'S TANKER INDUSTRIES, INC.,

ORDER SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by William Reilly, appellee, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

MAX ROSENN,

Judge.

Dated: July 28, 1975.

APPENDIX E.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 70-3450.

WILLIAM REILLY

v.

UNITED STATES OF AMERICA

AND

MATHIASEN'S TANKER INDUSTRIES, INC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(AS AMENDED)

NEWCOMER, *J.* June 4, 1974

FINDINGS OF FACT.

1. Plaintiff, William Reilly, was born on January 31, 1906 in New York City, New York.

2. Plaintiff is presently 68 years old and has a life expectancy of 11.4 years.

3. Since 1930, plaintiff's primary employment has been as a merchant seaman, although from time to time he has engaged in other employment shoreside.

4. Between 1962 and July 24, 1970, plaintiff's sole employment was as a merchant seaman, with continuous unbroken sea service during this nine (9) year period of time.

5. As of July 24, 1970, plaintiff was a member in good standing of the National Maritime Union and had earned nine (9) years of the fifteen (15) years of service credit required in order to qualify for the minimum National Maritime Union retirement pension of $150.00 per month, after fifteen (15) years of continuous service as a merchant seaman.

6. Plaintiff joined the USNS SUAMICO, a public vessel owned and operated at all times material hereto by defendant, United States of America, on June 25, 1970, as a member of the crew of that vessel, in the capacity of a saloon messman.

7. During the period of his service aboard the USNS SUAMICO, between June 25 and July 25, 1970, plaintiff well and truly performed all of his duties and was obedient to all lawful commands of the Master and the other officers of the vessel.

8. Between June 25 and July 23, 1970, plaintiff performed all work required of him as a saloon messman aboard the USNS SUAMICO without any physical incapacities or disabilities.

9. Prior to plaintiff's joining the USNS SUAMICO on June 25, 1970, he, at defendant's request, underwent a pre-sign-on physical examination by Dr. Joseph J. Tritico, a physician selected by defendant.

10. Following said pre-sign-on examination by Dr. Tritico, plaintiff was certified as being physically fit to perform all duties required of him as a saloon messman aboard the USNS SUAMICO and was found not to have any impairments or disabilities with respect to any portions of his body, including his right hip and both lower extremities.

11. At the time that plaintiff joined the USNS SUAMICO and during the period of his service aboard that vessel between June 25 and July 23, 1970, plaintiff was physically fit and capable of performing each and every duty and function required of him in his employment capacity as a merchant seaman and, more specifically, as a saloon messman.

12. On the evening of July 23, 1970, plaintiff, properly and lawfully, took shore leave from the USNS SUAMICO, along with a number of other crewmen aboard the vessel, while the vessel was moored in waters off of Goose Bay, Labrador, Canada.

13. In order to gain egress from the USNS SUAMICO to shore and return, while the vessel was moored in the waters as aforesaid, plaintiff was required to utilize the transportation provided for him and his fellow crew members by defendant.

14. This transportation consisted of an L. C. M. (Landing Craft Mechanized) vessel, which was approximately 56 feet long and 14 feet in beam. This vessel was flat bottomed and squared off at the forward end, without the traditional pointed bow present on most motor launches used in the transport to and from shore of merchant seamen from a vessel moored in waters.

15. The L. C. M. was operated by the Canadian Department of Transport, and was contracted for and provided by defendant as transportation for the members of the crew of the USNS SUAMICO to gain access to shore and access to the vessel from the shore.

16. This L. C. M. was not the traditional type of motor vessel or motor launch used to transport merchant seamen from a vessel moored in waters to and from shore,

but had been traditionally used for purpose of the transportation of troops, vehicles, equipment and supplies during time of hostilities when it was necessary to land on beachheads. Due to the size, shape and configuration of the L. C. M., as described above, it was not as manuverable a type of craft as was the traditional motor vessel or motor launch used to transport seamen from a vessel moored in waters to and from shore.

17. While on shore, plaintiff and some fellow crew members visited a USO club. It is unclear whether they drank only beer or more potent liquor as well.

18. Some time between 0000 hours and 0100 hours on July 24, 1970, plaintiff returned from shore in Goose Bay, Labrador to the USNS SUAMICO aboard the L. C. M. described above.

19. The L. C. M. in question had a crew consisting of three men, a Captain, a deck man and an engineer.

20. When the L. C. M. arrived alongside of the USNS SUAMICO, the L. C. M. was not in any way moored, secured or tied up to the USNS SUAMICO or its gangway, although there was a boat-line available, attached to and hanging down from the vessel's gangway, the use or function of which was to moor and secure crafts, such as the L. C. M. in question, coming alongside of the vessel to the vessel or its gangway.

21. The Captain of the L. C. M., rather than mooring or tying up the L. C. M. to the USNS SUAMICO or its gangway, at the time that the crew members were debarking the L. C. M. and boarding the USNS SUAMICO, by use of the boat-line, attempted to keep the L. C. M. close to the vessel's gangway by jockeying the L. C. M. back and forth in the water.

22. As plaintiff was about to debark the L. C. M. and step onto the bottom of the gangway of the USNS SUAMICO, none of the three personnel that comprised the crew of the L. C. M. in any way assisted or aided plaintiff in his stepping off of the L. C. M. and up onto the bottom of the vessel's gangway.

23. When the L. C. M. arrived alongside of the USNS SUAMICO there was no gangway watchman or deck officer present at the head of the gangway of the USNS SUAMICO.

24. At the time that plaintiff and his fellow crew members were debarking the L. C. M. and ascending the vessel's gangway there was still no gangway watchman or deck officer at the head of the gangway to see that the gangway was safe for boarding or to assist plaintiff onto and up the vessel's gangway.

25. At the time that plaintiff was debarking the L. C. M., the height of the bottom of the gangway of the USNS SUAMICO was some distance above the gunwale of the L. C. M., by reason of the fact that there was no gangway watchman or deck officer present at the head of the ganway at the time to adjust the height of the gangway by lowering it to a position even with the gunwale of the L. C. M.

26. If there had been a gangway watchman or deck officer present at the head of the gangway of the USNS SUAMICO at the time of the arrival of the L. C. M. alongside of the vessel, the height of the vessel's gangway could have been easily adjusted downward and the bottom of the gangway could have been made level with the gunwale of the L. C. M. by simply having one man lower the gangway.

27. Because the height of the bottom of the gangway of the USNS SUAMICO was some distance above the gunwale of the L. C. M., plaintiff, in his attempt to debark the L. C. M. and step up onto the bottom of vessel's gangway, had to grab hold of the gangway's chain bridle with his right hand, step up with his left foot onto the bottom of the gangway and then pull his right leg and foot and himself up onto the bottom of the gangway.

28. There is conflicting testimony among plaintiff's witnesses about what happened to plaintiff as he attempted to climb onto the gangway from the L. C. M. It appears that plaintiff had secured hold of the chain bridle and had already stepped up to the bottom of the gangway with his left foot, when the bow of the L. C. M. either rose up and threw him against the ship's side or gangway, or dropped away, leaving plaintiff suspended, and then returned to throw him against the ship or gangway.

29. It appears that the motion of the L. C. M. that resulted in plaintiff's being thrown against the ship's side or gangway was caused by the L. C. M. operator's attempt to stay close to the vessel's gangway by use of its controls and motors.

30. Immediately after the L. C. M. struck plaintiff, the L. C. M. pulled back, at which time one of plaintiff's fellow crew members reached out and grabbed hold of plaintiff, in order to prevent plaintiff from falling into the water.

31. At the time that plaintiff was struck by the L. C. M., plaintiff felt an excruciating pain all over his body.

32. As a result of his impact with the ship or gangway which resulted from the impact with the L. C. M., or merely from the twisting that accompanied these impacts,

plaintiff suffered an intertrochanteric fracture of his right hip and a compression fracture of his first lumbar vertebra.

33. Following this incident, plaintiff was unable to walk and was carried up the gangway of the USNS SUAMICO and placed on the main deck of the vessel in a prone position on his back. While so situated, plaintiff was in a semi-conscious state and felt pain throughout his entire body during his conscious moments.

34. Plaintiff was then carried, by a number of his fellow crew members aboard the USNS SUAMICO, down to his foc'sle, where he remained in bed, throughout the night and until the following morning, in a semi-conscious state.

35. During the night, whenever plaintiff had conscious moments he was in a great deal of pain, which required injections of codeine and administering of phenobarbital by the Chief Mate for purposes of alleviation of the same.

36. Some time between 0700 hours and 0900 hours on July 24, 1970, plaintiff was removed on a stretcher from the USNS SUAMICO and was transported to the United States Air Force Hospital in Goose Bay, where a diagnosis of "intertrochanteric fracture right femur" was made shortly following his admission to that hospital at 0930 hours.

37. Plaintiff was repatriated to the United States from the United States Air Force Hospital in Goose Bay aboard a United States Air Force cargo plant.

38. Shortly following his arrival back in the United States on July 25, 1970, plaintiff was admitted as an in-patient to the United States Public Health Service Hospital in Staten Island, New York, where he remained confined until September 25, 1970.

39. On July 27, 1970, while hospitalized at the Staten Island Public Health Service Hospital, plaintiff was op-

erated on in order to repair the trochanteric fracture of his right hip.

40. This operation involved making an incision 9½" long along the shaft of his right femur, cutting through the various layers of skin down to the femur in the greater trochanteric area, aligning the fracture and placing a guide-wire into the femoral head and then tapping a 4½" Jewett nail into place, following which five screws were screwed down tightly in order to secure the position of the Jewett nail.

41. Following this operative procedure for the reduction of the intertrochanteric fracture of plaintiff's right hip by the internal fixation of the Jewett nail, plaintiff continued on bed rest and traction and then started on physical therapy with crutch walking during the remainder of his stay at the Staten Island Public Health Service Hospital until September 24, 1970, on which date he was discharged as an inpatient.

42. During the period of plaintiff's inpatient hospitalization from July 25 to September 24, 1970, he experienced significant physical pain, discomfort and suffering, for the alleviation of which he was administered demerol and codeine several times a day.

43. Plaintiff was readmitted as an inpatient to the United States Public Health Service Hospital in Staten Island, New York on October 17, 1970, where he remained confined until January 29, 1971, for the purpose of receiving physical therapy treatments in an effort to alleviate his limited range and restriction of motion of his right hip.

44. Between January 29 and July 2, 1971, while plaintiff continued under the care of the United States Public Health Service Clinic in Staten Island, New York, on an

outpatient basis, he began to experience stiffness in and flexion contracture of his right knee, with limitation of knee extension, as a result of which he developed a limp. This flexion contracture was caused, at least in part, by plaintiff's lengthy immobilization due to his hospitalizations for treatment of his hip fracture.

45. By September, 1971, it had been determined by all orthopedic medical specialists who had had any opportunity to treat or examine plaintiff for his right hip condition and his right knee flexion contracture that plaintiff had been in the past and was going to be in the future totally disabled from and unable to ever return to his former employment as a merchant seaman.

46. Plaintiff remained on a "not fit for duty status" according to the certification of the United States Public Health Service in Staten Island, New York, from July 24, 1970 through May 25, 1972 and for a projected period of three months thereafter.

47. Between July 29, 1971 and June 27, 1972, during the period of plaintiff's outpatient treatment at the United States Public Health Service clinic in Staten Island, New York, various therapeutic and rehabilitative suggestions and procedures were initiated and prescribed, such as exercising and the wearing of a spring loaded knee brace, in order to attempt to improve, alleviate and benefit plaintiff's physical condition, insofar as his right hip disability and limitation and right knee flexion contracture was concerned.

48. In June, 1972, a spring loaded knee brace was prescribed, fitted and worn by plaintiff, which involved a considerable amount of physical pain, annoyance and discomfort to him.

49. On July 16, 1972, plaintiff suffered a cerebral vascular accident (stroke) while walking along the street.

He was immediately admitted to St. Luke's Hospital Center in New York City, New York.

50. Although at the time of his admission to the St. Luke's Hospital plaintiff was totally paralyzed, with an inability to move any of his upper or lower extremities and an inability to speak, by the time of his discharge from the hospital on October 17, 1972, the only residual deficit from the stroke was that of "minimal residual weakness R leg, increasing ability to walk & physiotherapy." (Discharge note of October 17, 1972 in the St. Luke's Hospital records).

51. Plaintiff was transferred from St. Luke's to St. Barnabas' Hospital for Chronic Diseases in Bronx, New York, on October 18, 1972 following his stroke.

52. During the period of plaintiff's hospitalization at St. Barnabas Hospital, he was noted to lack about 40° full right knee extension and, therefore, had a much more pronounced right knee flexion contracture than he had had in the several months prior to his stroke.

53. During November and December, 1972, while he was hospitalized at the St. Barnabas Hospital, plaintiff consulted and was examined by several orthopedic and surgical specialists who suggested surgical procedure (hamstring tenotemy and post capsulotomy) for the alleviation of plaintiff's right knee flexion contracture.

54. During the period of plaintiff's hospitalization at the St. Barnabas Hospital, he experienced and was subjected to considerable physical pain and discomfort in connection with the exercise and physical therapy that he was subjected and exposed to for purposes of stretching the right knee flexion contracture.

55. At the time of plaintiff's discharge from the St. Barnabas Hospital on December 14, 1972, he had a sig-

nificant right knee flexion contracture, but had no disability, neurological deficit, restriction or limitation of motion or any contracture of his left lower extremity, which was totally fit and sound.

56. Plaintiff was admitted as an inpatient to the United States Public Health Service Hospital in Staten Island, New York on March 22, 1973 because of his inaiblity to walk due to flexion contractions in both knees. He had had to confine himself to bed approximately three weeks prior to his admission to the hospital and upon beginning such bed rest a limited range of motion developed in his left knee and got progressively worse until the time of his admission.

57. Plaintiff's left knee flexion contracture was secondary to his right knee flexion contracture, which had caused plaintiff to confine himself to bed with a resultant disuse of the left lower extremity and the left knee and knee joint.

58. During plaintiff's confinement as an inpatient at the United States Public Health Service Hospital in Staten Island, New York, from March 22 to June 21, 1973, he underwent a regimen of progressive bi-lateral knee stretching exercises and was at one point placed in knee splints, which he could not tolerate due to the severe pain that he experienced when wearing the same.

59. On June 21, 1973, plaintiff was discharged as an inpatient from the United States Public Health Service Hospital in Staten Island, New York and was certified as "permanently not fit for duty" by his treating physicians at that facility. Since then, plaintiff has been "permanently not fit for duty" and will remain so for the remainder of his life.

60. Plaintiff was hospitalized at the Bellevue Hospital in New York City, New York from September 28, 1973 to February 2, 1974, inclusive, during which time he underwent intensive and extensive physical and rehabilitative therapy, the purpose of which was to alleviate and improve his now bi-lateral knee flexion contractures. The course of therapy received by plaintiff during his inpatient hospitalization at the Bellevue Hospital consisted of exercises, ambulation with the aid of parallel bars and ambulation with the aid of a walker and crutches.

61. Despite the course of rehabilitative and physical therapy received by plaintiff while he was hospitalized as an inpatient at Bellevue Hospital, he still continued to have bi-lateral knee flexion contractures at the time of his discharge from the hospital on February 2, 1974 and was able to walk only with the use of a walker or a standing cane.

62. Plaintiff has continued to experience physical pain, discomfort and annoyance at and over the operative site of where the Jewett nail was internally fixed and still continues to remain since the time of the internal fixation of the Jewett nail on July 27, 1970 and up to and including the present time and will continue to experience such pain, discomfort and annoyance for the remainder of his life, as the Jewett nail will permanently remain inside his body for the remainder of his life.

63. At the time of plaintiff's accident and injuries of July 24, 1970, he then being 64 years of age, had a work-life expectancy, according to the Life Expectancy Tables of the United States Department of Health, Education and Welfare, of 5.5 years and required another 6 years of additional continuous sea service in order to qualify for the

minimum monthly National Maritime Union retirement pension of $150.00 per month, payable to a merchant seaman after 15 years of continuous sea service.

64. Had plaintiff not been disabled, due to the injuries he sustained while attempting to board defendant's ship, and the complications which resulted therefrom, plaintiff would have continued in his employment as a merchant seaman for the remainder of his work life expectancy.

65. We cannot find as a fact that plaintiff would have continued working the six additional years necessary to become eligible for his minimum National Maritime Union pension of $150.00 per month.

66. Plaintiff is entitled to receive the value of his contributions to his welfare and pension under the applicable National Maritime Union contracts.

67. During the period from July 25, 1970 through June 15, 1974, under 4 separate National Maritime Union contract years (all of which were based upon eight (8) months work years), the following wage rates have prevailed for messmen, such as plaintiff, serving aboard United States flag tanker vessels:

Dates	*Base Wage*	*Overtime*	*Vacation*	*Welfare*	*Pension*	*Monthly*	*Annual*
7/25/70-6/15/71 ..	$386.44	$302.66	$167.44	$48.00	$343.67	$1,248.21	$ 9,985.68
6/16/71-6/15/72 ..	409.63	340.20	177.49	48.00	400.50	1,375.82	11,006.56
6/16/72-6/15/73 ..	430.11	355.31	207.73	66.60	410.70	1,470.45	11,763.60
6/16/73-6/15/74 ..	451.62	371.17	224.77	66.60	426.85	1,541.01	12,328.08

68. Accordingly, plaintiff's total past loss of earnings as a result of his inability to sail as a merchant seaman, i.e. a saloon messman, aboard United States flag tanker vessels between July 25, 1970 and June 15, 1974, four full National Maritime Union contract years, is in the amount of $45,083.92.

69. Plaintiff, as of June 15, 1974, has a remaining work-life expectancy of 19 months.

70. Under the applicable and projected National Maritime Union contract agreements for two years in the future, plaintiff would have earned the following amounts:

Dates	*Base Wage*	*Overtime*	*Vacation*	*Welfare*	*Pension*	*Monthly*	*Annual*
6/16/74-6/16/75	$474.20	$387.82	$242.31	$66.60	$433.50	$1,604.43	$12,835.44
6/16/75-1/16/75 (7 months)	497.91	407.21	253.38	66.60	433.50	1,658.60	7,740.25

71. When plaintiff's loss for future impairment of his earning capacity is reducted to its present value at the rate of 6% interest, it is computed as follows:

6/16/74-6/16/75	—	$12,065.32
6/16/75-6/16/76	—	7,275.83
		$19,341.15

72. Plaintiff's present medical condition, insofar as his right hip and the limitation of motion and the use thereof and his bi-lateral knee contractures, will never improve but may become progressively worse. Plaintiff is presently unable to bear any weight whatsoever on his right leg due to the deteriorated condition of his right hip and the permanent flexion contracture of his right knee, but is able to

bear some weight on his left leg even with the left knee flexion contracture, and such conditions are permanent in nature.

73. Plaintiff's life expectancy, according to the Life Expectancy Tables of the United States Department of Health, Education and Welfare, is presently 11.4 years.

74. Plaintiff is awarded the sum of Ten Thousand ($10,000) Dollars to compensate him for all of the physical pain, suffering, and discomfort which he has suffered in the past and for all of the physical pain, suffering and discomfort which he may endure in the future as a result of being struck by the L. C. M. on July 24, 1970.

75. Plaintiff is awarded the sum of Five Thousand ($5,000) Dollars to compensate him for the permanent physical injuries and damage that will endure for the remainder of his life and cause him permanent limitation of motion and inability of use of his right hip, permanent right knee flexion contracture and permanent inability to walk or ambulate by himself without the use of a walker or a standing cane.

76. Plaintiff is awarded damages in the total amount of Seventy Nine Thousand Four Hundred Twenty Five Dollars and Seven Cents ($79,425.07) to compensate him for the following items of damages:

(a) Past loss of earnings:	$45,083.92
(b) Future impairment of earning capacity:	19,341.15
(c) Past, present and future pain and suffering:	10,000.00
(d) Permanent physical injuries:	$5,000.00

CONCLUSIONS OF LAW.

1. Jurisdiction over this case is based on 28 U. S. C. § 1333.

2. On July 24, 1970, at the time and place that plaintiff, William Reilly, was injured, the USNS SUAMICO, together with its appliances, gear and appurtenant equipment (including the L. C. M. involved herein) was unseaworthy by reason of the presence of the following unsafe and dangerous conditions:

(a) an L. C. M. that was jockeying in the waters adjacent to and abreast of the gangway of the vessel in an attempt to remain close to the gangway during the time that plaintiff was debarking the L. C. M. and stepping up onto the vessel's gangway;

(b) an L. C. M. that was not in any way moored, seured or tied up to the USNS SUAMICO or its gangway by use of the available boat-line, during the time that plaintiff was debarking the L. C. M.;

(c) the absence of a gangway watchman or deck officer at the head of the gangway of the USNS SUAMICO, from the time that plaintiff and his fellow crew members arrived back along-side of the vessel in the L. C. M. up until the time that plaintiff was disembarking the L. C. M.; and

(d) a gangway, which plaintiff was required to pull himself up onto and then ascend after disembarking the L. C. M. in question, that was rigged and positioned in such a manner so that the height of its bottom was some distance above the gunwale of the L. C. M. from which plaintiff had to step up in order to gain access to the bottom of the gangway.

3. Defendant, United States of America, was negligent, through its agents, servants, officers, crew members and employees (including the crew members and personnel of the L. C. M. involved herein), and breached its non-delegable duty and obligation to provide plaintiff with a reasonably safe place within which to work and with a reasonably safe means of ingress to the USNS SUAMICO by reason of its failure to exercise due care as follows:

(a) the jockeying of the L. C. M. back and forth in the waters in an attempt to keep the L. C. M. close to the gangway of the USNS SUAMICO during the time that plaintiff was in the process of debarking the L. C. M. and stepping up onto the bottom of the vessel's gangway;

(b) the failure to moor, secure or tie up the L. C. M. to the USNS SUAMICO or its gangway by use of the available boat-line;

(c) the failure of the three members of the crew of the L. C. M. to in any way aid or assist plaintiff in disembarking the L. C. M. and stepping up onto the bottom of the gangway of the USNS SUAMICO;

(d) the absence of a gangway watchman or deck officer at the head of the gangway of the USNS SUAMICO at the time that plaintiff and his fellow crew members arrived back alongside of the vessel in the L. C. M.;

(e) the presence of a gangway, which plaintiff was required to pull himself up onto and then ascend after disembarking the L. C. M. in question, that was rigged and positioned in such a manner so that the height of its bottom was some distance above the gunwale of the L. C. M. from which plaintiff had to

step up in order to gain access to the bottom of the gangway; and

(f) the absence of a gangway watchman or deck officer at the head of the gangway of the USNS SUAMICO at the time that plaintiff was disembarking the L. C. M., whose duty it was to see that the gangway was safe for boarding and who, if present, could have easily adjusted the height of the gangway downward by lowering it so that the bottom of the gangway would have been level with the gunwale of the L. C. M.

4. The injuries and conditions with which plaintiff has been and continues to be afflicted, including the intertrochanteric fracture of his right hip and the permanent limitation of motion and disability of the same, the now permanent flexion contracture of his right knee and the compression fracture of his first lumbar vertebra, with all of the attendant physical pain, suffering, discomfort, limitation of motion and mental anguish which plaintiff has suffered in the past and which he may endure in the future, were directly and proximately caused by the unseaworthiness of the USNS SUAMICO, the negligence of the defendant and the failure of the defendant to provide plaintiff with a reasonably safe place within which to work and a reasonably safe means of ingress to its vessel on July 24, 1970, when plaintiff was struck by the L. C. M. while in the process of disembarking the same and stepping up onto the bottom of the gangway of the USNS SUAMICO.

5. The progressive worsening and deterioration of the condition of plaintiff's right lower extremity and in particular his right knee flexion contracture subsequent to December 14, 1972—with plaintiff's consequent inability to walk or ambulate by himself, without the use of a walker or

a standing cane—was caused, at least in part, by the negligence of the defendant and its failure to provide plaintiff with a reasonably safe place within which to work and a reasonably safe means of ingress to its vessel on July 24, 1970, when plaintiff was struck by the L. C. M. while in the process of disembarking the same and stepping up onto the bottom of the gangway of the USNS SUAMICO.

6. Plaintiff has suffered permanent physical injuries and damage that will endure for the remainder of his life and cause him permanent limitation of motion and inability of use of his right hip, permanent right knee flexion contracture and permanent inability to walk or ambulate by himself without the use of a walker or a standing cane, all of which permanent injuries have been caused, at least in part, by the negligence of the defendant and its failure to provide reasonably safe means of ingress to its vessel on July 24, 1970, when plaintiff was struck by the L. C. M. while in the process of disembarking the same and stepping up onto the bottom of the gangway of the USNS SUAMICO.

7. A verdict is entered in favor of plaintiff, William Reilly, and against defendant, United States of America, in the total amount of Seventy Nine Thousand Four Hundred Twenty Five Dollars and Seven Cents ($79,425.07).

MAINTENANCE AND CURE.

1. Plaintiff, William R. Reilly, served aboard the USNS SUAMICO in the capacity of saloon messman from June 25 to July 25, 1970.

2. Defendant, United States of America, owned, operated, managed, possessed and controlled the USNS SUAMICO and for purposes of the within action is responsible to plaintiff for any contractual responsibilities of an employer to a merchant seaman working aboard its vessel.

3. On July 24, 1970, plaintiff was injured while returning to the USNS SUAMICO from shore.

4. The National Maritime Union contract applicable provides for the payment of maintenance and cure benefits to a seaman who is injured or becomes ill while employed aboard a vessel at the rate of eight dollars ($8.00) per day.

5. Between July 25, 1970 and March 5, 1972, plaintiff was paid maintenance and cure benefits by defendant for all periods of time during which he was appropriately entitled to maintenance and cure payments under the applicable National Maritime Union contract.

6. Defendant terminated maintenance and cure payments to plaintiff on March 5, 1972, on which date plaintiff was still "not fit for duty" according to the medical certification of the United States Public Health Service Hospital in Staten Island, New York.

7. Plaintiff continued on a "not fit for duty" status, according to the United States Public Health Service Hospital in Staten Island, New York, from March 5, 1972 through June 21, 1973.

8. Dr. Beller testified that, as of September 23, 1971 plaintiff had reached a plateau of medical care for recovery. At that time plaintiff was having only follow-up visits at three month intervals with the Public Health Service and was not undergoing active treatment or therapy, but merely observation. On May 30, 1973, plaintiff was re-examined by Dr. Beller, whose findings were essentially the same as those of September, 1971. Plaintiff still had a right knee contracture of 20°. Dr. Beller testified that his findings on May 30, 1973 confirmed and reinforced his prior opinion that plaintiff had reached a point of maximum cure in September, 1971. Dr. Beller also concluded on May 30, 1972 that plaintiff would not benefit from further treatment.

On May 25, 1972, the orthopedic examination suggested that "perhaps a spring loaded knee brace would help." Accordingly, he was fitted with a knee brace on June 27, 1972. Three weeks later, plaintiff had a stroke on July 16, 1972. At trial, Dr. Beller testified that, in his opinion, plaintiff's condition would not improve, even with a spring loaded knee brace, as a knee brace would not aid significantly in stretching a two year old contracture on a 66 year old man, and in any event, would require 6 weeks to 3 months of continued use before any improvement is possible in a likely candidate. Dr. Klinghoffer admitted that, in the three week period from the time of receiving the brace on June 27, 1972 to the day of his stroke on July 16, 1972, plaintiff would have achieved little, if any, benefit or improvement in plaintiff's right knee, even if plaintiff had used the knee brace for the full period, which plaintiff did not do. It is obvious therefore that the knee brace could not have aided plaintiff in this period as he discarded its use within 19 days of receipt.

We find therefore that plaintiff had reached a state of maximum possible cure by September 21, 1971 when plaintiff was found to have a 20° right knee flexion contracture. Plaintiff's condition would not, and in fact did not, improve after that time. However, as plaintiff continued to receive maintenance and cure until March 6, 1972, and since plaintiff had reached the point of maximum cure before that date, plaintiff is not entitled to recover any additional sums in this action for unpaid maintenance and cure.

CONCLUSIONS OF LAW.

1. As a result of plaintiff's service aboard the USNS SUAMICO and as a result of his being injured while attached to and employed upon such vessel, he is entitled to maintenance and cure payments at the rate of eight dollars ($8.00) per day.

2. Plaintiff reached maximum cure before March 5, 1972, the date on which defendant terminated his maintenance and cure payments.

ORDER.

AND NOW, to wit, this 4th day of June, 1974, it is hereby Ordered that judgment be entered in favor of plaintiff and against defendant in the sum of Seventy Nine Thousand Four Hundred Twenty Five Dollars and Seven Cents ($79,425.07).

AND IT IS SO ORDERED.

CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-585

WILLIAM REILLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit against the United States for injuries he sustained while attempting to board the U.S.N.S. SUAMICO, an oil tanker owned by the United States and operated by Mathiasen's Tanker Industries, Inc.[1] At the time of the incident, the ship was anchored at Terrington Basin, Goose Bay, Labrador. Petitioner was transported to the ship in an LCM (landing craft mechanized). He injured his hip when attempting to transfer from the LCM to the gangway of the ship.

The district court entered a judgment for petitioner, finding that the SUAMICO was unseaworthy at the time petitioner attempted to board because the LCM was not secured to the ship during the boarding and because no member of the ship's crew was present to assist petitioner in boarding the ship (Pet. App. 33a).

[1]Plaintiff's suit against Mathiasen was dismissed by agreement of the parties at the beginning of trial (Pet. App. 6a, n. 3).

The court of appeals reversed (Pet. App. 3a-14a) on the ground that the district court's "findings of fact are clearly erroneous" (*id.* at 6a). The court of appeals recognized (*id.* at 7a) that a finding of fact may be set aside as clearly erroneous only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (*United States* v. *Oregon State Medical Society*, 343 U.S. 326, 339). It stated: "After a careful review of the record, we are convinced that the undisputed physical evidence conflicts with [petitioner's] version of the accident and supports the version of the United States" (*id.* at 7a).

Petitioner's only contention is that the court of appeals gave insufficient weight to the district court's findings. It is clear, however, that the court of appeals applied the proper legal standard, fully recognizing that "the trier of fact has the primary responsibility of weighing the evidence" (*id.* at 6a) and that the district court's findings could be set aside only if the evidence is incapable "of supporting with reason the conclusions expressed" (*ibid.*). A thorough analysis of the record convinced the court of appeals that "[t]he evidence is insufficient from which to find that [petitioner's] injuries, either in whole or in part, were caused by any unseaworthiness of the SUAMICO or negligence of the United States" (*id.* at 11a).

Futher review of the evidence by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12